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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

OZZY MURILLO,

Defendant and Appellant.

A153536

(San Francisco County
Super. Ct. No. SCN227380)

Defendant Ozzy Murillo kicked a San Francisco MUNI bus passenger in the head without any provocation, and a jury found him guilty of assault with force likely to produce great bodily injury upon a public transit passenger, simple misdemeanor battery, and resisting a peace officer.

Defendant argues on appeal that the trial court abused its discretion by limiting the testimony of one of his expert witnesses and excluding other evidence supporting his defense of unconsciousness. We find no merit in these claims, and were there nothing more, we would affirm the judgment. But defendant also seeks a remand for the trial court to conduct a mental health diversion eligibility hearing under Penal Code section 1001.36, a new law that went into effect after he was convicted. We agree that a remand is appropriate, and conditionally reverse the judgment and remand to the trial court to conduct a hearing to determine whether defendant is eligible for mental health diversion under Penal Code section 1001.36.

FACTUAL AND PROCEDURAL BACKGROUND

The Assault on the MUNI Bus and Arrest

On March 23, 2017, Rich Tran, an off-duty San Francisco MUNI bus driver, was a seated passenger on a MUNI bus when defendant kicked him in the head and caused Tran's head to strike the window. Tran had not done anything to provoke the defendant. Tran felt pain, touched his head, and then saw blood on his hand. When he looked up, Tran saw defendant.

Another passenger saw defendant kick Tran in the head. Defendant then paced about the bus, growing more irate.

When San Francisco police officers arrived, bystanders identified defendant as the person who attacked Tran. Police struggled to arrest defendant, who continued to resist even after police commanded him to stop resisting and took him to the ground. The attack and the events immediately after were captured on MUNI surveillance video and police body-worn cameras.

Defendant was charged with assault with a deadly weapon on a public transit passenger (Pen. Code, § 245.2; count 1), battery with serious bodily injury (Pen. Code, § 243, subd. (d); count 2), and misdemeanor resisting a peace officer (Pen. Code, § 148, subd. (a)(1); count 3). Counts 1 and 2 also alleged great bodily injury enhancements (Pen. Code, §§ 12022.7, subd. (a), 1192.7, subd. (c)(8), respectively).

Expert Testimony

Defendant raised an unconsciousness defense at trial. His counsel argued defendant "didn't set out to hurt anybody that day. Mr. Murillo was legally unconscious of what he was doing when his foot made contact with Mr. Tran."¹ Defendant called two

¹ The jury was instructed with CALCRIM No. 3425 that defendant would not be guilty of any of the crimes charged in this case "if he acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. Someone may be unconscious even though able to move. [¶] Unconsciousness may be caused by a blackout, or an epileptic seizure, or involuntary intoxication, or an unsound mind which makes a person unaware of their actions. [¶] The people must prove beyond a reasonable doubt that the defendant was conscious when he acted. If there is proof

expert witnesses, a psychiatrist and a licensed clinical social worker, both of whom had treated defendant.

Dr. Michael Ghaly was a staff psychiatrist with 11 years experience at the San Francisco county jail. He testified that common symptoms of psychosis include disorganized thinking, delusional thinking, internal preoccupation (i.e. responding to some kind of internal stimuli), and possible auditory, visual, and/or tactile hallucinations. Pacing, erratic behavior, violent behavior and “behaving in ways that’s out of context or disconnected from one’s surroundings” could also be symptomatic of psychosis.

Ghaly explained there are many medications to treat psychosis, and these drugs sometimes help to control the symptoms. A person who is psychotic and taking prescription medication may not exhibit symptoms of their psychosis, but a person who is not taking their prescribed medication is more likely to display psychotic symptoms.

Ghaly further testified that individuals who are psychotic sometimes lose awareness of their actions and their surroundings. He agreed that a person who is psychotic may appear normal “but in reality they’re not conscious of what is happening,” and that it is not “always obvious to an untrained person when a psychotic person is in such a state of unconsciousness.”

In 2015, Ghaly examined defendant. He diagnosed defendant with an unspecified psychotic disorder and prescribed antipsychotic medication.

Ghaly evaluated defendant again on April 2, 2017 (less than two weeks after the assault on the MUNI bus), and again diagnosed him with an “unspecified psychotic disorder.” At the time, defendant exhibited “delusional thinking around sex” and had “vague auditory hallucinations.” Ghaly prescribed antipsychotic medications. He did not know whether defendant has been compliant with the medication he prescribed.

beyond a reasonable doubt that the defendant acted as if he were conscious, you should conclude that he was conscious, unless based on all the evidence, you have a reasonable doubt that he was conscious, in which case you must find him not guilty.”

Defense counsel asked Ghaly a hypothetical question “about a person that you have diagnosed as having a psychotic disorder not otherwise specified, someone who you prescribed antipsychotic medications to in the past.” Ghaly was asked “to assume that that person gets on a bus and, unprovoked, kicks another passenger in the head. That person then proceeds to stay on the bus. Makes no attempt to flee the bus. Says things in a loud, aggressive voice to no one in particular, things that don’t make sense or are out of context, disconnected from what’s happening. That person paces back and forth and that person is described by other passengers on the bus as being a psychopath.” Ghaly agreed (“absolutely”) the hypothetical person described was consistent with someone who is psychotic. Direct questioning continued:

“Q: And is that behavior consistent with someone who as a result of their psychosis is unconscious of their actions?

“A: That could be the case certainly.

“Q: And is it consistent with someone who lacks awareness of their own actions?

“A: That also could be the case.”

The cross-examination of Ghaly was very brief and included the following discussion on the hypothetical:

“Q: If a person does an act and immediately after says what he did and why[,] that is evidence that he was conscious at the time of the act; correct?^[2]

“... .

“A: It seems that would be the case.

“... .

“Q: If a person does an act for an imaginary or delusional reason, that doesn’t mean they were necessarily unconscious; true?

“A: True.”

² At this point, the trial court overruled defense counsel’s objection that the question “calls for a legal conclusion,” and let Ghaly answer the question.

The next court day, defendant called Westley Rutter to testify. Rutter earned a master's degree in clinical social work and, since December 2016, has a license to practice as a social worker in California. In addition, he was certified to "evaluate and put people on [Welfare and Institutions Code section] 5150 holds in the city of San Francisco;" and certified to use ANSA, the "San Francisco community mental health assessment tool" that clinicians working in the Department of Public Health Community Behavioral Health Services use for "assessing the needs and strengths" of each client.³

Rutter was a clinical social worker at UCSF Citywide Case Management (Citywide), where he provided assessments, treatment planning, intensive case management (which involves outreach and coordinating with other treatment providers and city services), crisis intervention, and group therapy. He also maintained a small part-time private practice, providing individual and couples psychotherapy.

In the course of his work at Citywide, he assessed and diagnosed his clients. He considered a person's symptoms, level of functioning, risk factors and overall presentation, and worked closely with psychiatrists and nurses to help coordinate medication management and develop diagnoses collaboratively.

Rutter became defendant's clinical social worker at Citywide in October 2016 and has worked regularly with him since then. Rutter has diagnosed defendant with posttraumatic stress disorder and as meeting the criteria for psychotic disorder NOS (not otherwise specified). He reached a "working diagnosis" of bipolar disorder with psychotic features. Although Rutter had not witnessed defendant experience a "full-blown manic episode," he has observed defendant in a psychotic episode that included "[p]ersistent delusional beliefs, auditory hallucinations, visual hallucinations, disorganized thought, disorganized behavior." When Rutter was asked to describe his observations of defendant "when he's exhibiting psychotic symptoms that support your

³ A "5150 hold" is a 72-hour custodial hold for evaluation when a person, "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled." (Welf. & Inst. Code, § 5150.) ANSA stands for "Adult Needs and Strength Assessment."

diagnosis of him,” Rutter testified, “[A] hallmark of psychosis is not being aware of how your thoughts, behaviors are out of touch with reality. So I suppose there was—there was a time where he came to the clinic and was appearing kind of agitated in a way and moving his hands in a way that the security staff called me to try and come and assess and deescalate him. And upon evaluation, he really didn’t have any clue as to—that he was doing that.”

The last time Rutter saw defendant before the March 23 incident was a week earlier, on March 15.

Rutter had never worked with or coordinated defendant’s prescription medication, and defendant did not “receive any psychiatry” through Citywide. In March 2017, the month of the incident, defendant had not been prescribed medication by anyone in the San Francisco mental health system. But since the incident, defendant has been prescribed antipsychotic medications. Rutter testified generally that, in his experience, he had “witnessed positive effects of medication compliance with antipsychotics.”

Verdict and Sentence

The jury found defendant guilty of assault with force likely to produce great bodily injury upon a public transit passenger (count 1), simple battery (a lesser included of count 2), and resisting a peace officer (count 3).⁴

Defendant received a four-year sentence.⁵

⁴ The jury acquitted defendant of battery with serious bodily injury (count 2) and deadlocked on the great bodily injury enhancement for count 1. The court declared a mistrial on the enhancement.

⁵ This was composed of three years in custody for count 1, plus a consecutive year for a separate case for which defendant had been on probation.

DISCUSSION

I. Evidentiary Issues

A. Limitations on the Social Worker's Testimony

Defendant contends that the trial court abused its discretion by finding Rutter “unqualified to provide an opinion as to Murillo’s mental state during the offense or to provide more general information on mental illness, psychosis, and unconsciousness.”

1. Background

Defendant sought to admit Rutter’s testimony to support his defense that his psychosis rendered him legally unconscious when he kicked Tran. On July 31, 2017, the trial court held a hearing under Evidence Code section 402 (402 hearing) to determine the scope of Rutter’s testimony.⁶

Rutter testified he has been involved in diagnosing or ruling out “hundreds” of possible Axis I mental illness and was certified to order 5150 holds when appropriate. He was not a “medical professional.”

Rutter described his experience diagnosing individuals with psychotic disorders and working closely with psychiatrists who prescribe antipsychotic medications to his clients. He testified that some individuals experiencing a psychotic episode may be unable to recall that episode while others can, and that consciousness occurs on a spectrum ranging between heightened and decreased awareness.

Rutter kept written records of his treatment of defendant. He personally met with defendant nine times, not including group sessions. On one occasion, defendant appeared unaware of his body movements; he was showing a lot of “psychomotor agitation,” that is, “moving around in all these ways with his legs and hands.” Rutter saw defendant about a week before the March 23 incident, and he appeared depressed but not delusional.

⁶ All further references are to the Evidence Code unless otherwise noted. Because Rutter testified at trial, we will not restate the portions of his testimony at the 402 hearing that have already been described above, focusing instead on just the parts pertinent to this appeal.

Rutter reviewed video footage of the assault on the MUNI bus and gave his opinion that defendant “did appear to be experiencing an acute psychotic episode.” Rutter based his opinion on “[s]ort of a lot of disorganized behavior, agitation, a lot of delusional speech, what appears to be a response to auditory hallucination. [¶] . . . [¶] . . . Given [his] knowledge of [defendant’s] mental health history and diagnosis and [his] review of the video from March 23rd 2017,” Rutter agreed “[defendant’s] behavior *in the video* [was] consistent with him being in a psychotic episode and *lacking awareness of his actions*.” (Italics added.)

In cross-examination, Rutter acknowledged he was not a psychologist or a forensic psychologist, and agreed with the prosecutor’s statement that “certainly your training and experience isn’t in forensic psychology to the extent that you’d be able to look back on past situations and determine what someone’s mental condition was at that time; right?” He acknowledged that his opinion about the video was also based on conversations he had with defendant after the incident. Rutter also testified he had never seen defendant as “agitated” as he appeared on the video. And, on re-cross examination, Rutter made this concession:

“Q: People who are experiencing acute psychosis may very well be aware of their actions; correct?

“A: *There’s really no way of knowing.*” (Italics added.)

2. Trial Court’s Rulings

After the 402 hearing, the trial court ruled that Ghaly (the treating psychiatrist) and Rutter could testify at trial. As to Rutter, he could testify to “defendant’s diagnosis—because he’s qualified to do that—and describe observations of his interactions with the defendant, but he cannot testify to anything further as he did at the 402 hearing about whether or not the defendant’s symptoms are consistent with someone who is conscious or unconscious or aware or unaware. Based on his qualifications, he is able to testify to diagnosis and then he can describe his interactions, but that is all he can testify to.”

Later, defense counsel sought clarification on whether he could ask Rutter for his opinion on defendant's mental health after reviewing the MUNI surveillance and body camera videos of the event.

The court explained, "I don't think he's qualified to make an opinion based on the video evidence in this case. He's qualified to—he's licensed to make diagnosis, and the Court is going to let him testify about any observations in the interactions he has had with Mr. Murillo. [¶] But I don't think he's qualified to start opining about video evidence. And I don't think it's proper for him to be testifying about a video that he watched of Mr. Murillo. I think that goes well beyond what his qualifications are."

Following the jury verdict, defendant moved for a new trial, in part based on the trial court's limitations on Rutter's testimony. In denying the motion, the trial court sounded the same theme, explaining Rutter's testimony had been limited because he "was not qualified to express an opinion regarding a hypothetical because he is a licensed social worker, whose job is to manage health care for people. [¶] He does not prescribe medication and is not a doctor, so the Court found that he was not qualified to testify through a hypothetical about defendant's behavior regarding unconsciousness. [¶] The Court did allow Mr. Rutter to state his diagnosis, and to describe what he observed of the defendant . . . , but the Court found that he was not qualified to talk about symptoms being consistent or inconsistent with being unconscious or conscious."

3. Analysis

Evidence Code section 720, subdivision (a) provides, "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."

“ ‘The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited.’ ”

(*People v. Williams* (1989) 48 Cal.3d 1112, 1136, quoting *People v. Kelly* (1976) 17

Cal.3d 24, 39.) “It is not unusual that a person may be qualified as an expert on one

subject and yet be unqualified to render an opinion on matters beyond the scope of that

subject.” (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1334, disapproved on other grounds in *People v. Randolph* (2018) 28 Cal.App.5th 602.)

Defendant contends the trial court improperly concluded Rutter could not testify about defendant’s mental state based on video evidence or provide general testimony about psychosis and unconsciousness. We are not persuaded of error. There was no showing that Rutter had any specialized training or experience that would allow him to opine on or diagnose an individual from videos. And the record reflects that Rutter did testify expansively about psychosis and its treatment.

Defendant contends that the trial court made its decision simply because Rutter was not a medical doctor, and that no educational background is required to testify as an expert. But the trial court’s ruling, as we have described it, and the record on which it based its decision, is more nuanced than that.

Defendant relies primarily on *Chadock v. Cohn* (1979) 96 Cal.App.3d 205, 215, a medical malpractice case against a defendant physician and surgeon arising from his care and treatment of a leg and foot injury. The lower court granted a nonsuit motion at the end of plaintiff’s case solely on the ground that, as a matter of law, her proffered expert, a podiatrist, could not testify to the standard of care for a medical doctor. The lower court indicated that *only* a physician or surgeon could testify as an expert in the area and then said to the plaintiff, “ ‘Your man doesn’t meet that standard, *no matter how qualified he might be.*’ ” (*Id.* at p. 214, italics added.) This ruling was made despite a 402 hearing where the proffered podiatrist testified to “an inordinate background of education, knowledge, training and experience in the care and treatment of foot injuries,” including having been licensed for six years in a surgery practice. (*Id.* at p. 209.) The appellate court reversed because the test for admissibility of the expert’s testimony was simply whether the witness met the standards under section 720; there was no requirement *as a matter of law* that a witness be a medical doctor or possess the same professional degrees or certifications held by the defendant surgeon. And the error in excluding the proffered expert based solely on the fact that he was not a medical doctor was prejudicial because it prevented plaintiff from presenting her case for a verdict. (See *id.* at pp. 209, 214–215.)

In this case, the trial court did allow Rutter, who is not a medical doctor, to testify about defendant's treatment and medication, his past interactions with defendant, and Rutter's diagnosis of defendant. We cannot say the trial court's exclusion of Rutter's testimony about video evidence was an abuse of discretion in light of Rutter's own concession that he had no professional experience in forensic psychology and diagnosing someone based on a video recording. (See *People v. Williams*, *supra*, 48 Cal.3d at p. 1136.)⁷

In any event, even assuming error, we discern no prejudice under any standard because Dr. Ghaly provided testimony similar to Rutter's excluded testimony. (*Chapman v. California* (1967) 386 U.S. 18 [harmless beyond a reasonable doubt]; cf. *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 756 [exclusion of defense expert was under routine application of rules of evidence; proper standard of review set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)].) Ghaly testified that someone experiencing psychosis can lose awareness of their surroundings and actions. In responding to a hypothetical that tracked the facts of this case, Ghaly opined that the behavior was consistent with a person suffering from a psychotic event who could potentially be unconscious of their actions. Further, Rutter himself, as we have described, testified about defendant's history with delusions, hallucinations, and disorganized thought. Rutter testified about the one occasion when he did observe defendant with psychosis. And the jury was permitted to watch relevant portions of the video evidence from the day of the incident.

⁷ Defendant's reliance on *ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, an appeal of a denial of a wage and hour class certification motion, is even less helpful. There, the trial court denied the motion after finding the declarations of plaintiff's proffered expert, a provider of database services who analyzed timekeeping and payroll data in the case, were insufficient to qualify him as an expert and not material. The court's exclusion of the purported expert's evidence appeared to the Court of Appeal to have been "impermissibly tainted by its strong views" on the merits of the class certification motion, and whether individualized proof would be required. (*Id.* at p. 298).

Defendant also asserts the trial court erred in sustaining a relevancy and section 352 objection to whether Rutter had noticed “any positive response” in defendant to antipsychotic medication. No prejudice has been shown, because defense counsel then went on to elicit Rutter’s testimony that a patient’s positive response to medication would confirm his tentative diagnosis and a patient’s negative response would raise questions as to the accuracy of that diagnosis. Defendant’s response to antipsychotic medication, Rutter testified, supported his diagnosis.

Defendant argues the trial court erred in sustaining an objection on the ground of hearsay and speculation to whether defendant had “insight or awareness into the full range of symptoms and diagnoses you’ve just discussed with us.”⁸ We reject this argument, first, because we cannot say this was an abuse of discretion given that the question appears to call for defendant’s out-of-court statement and, second, because defendant fails to explain how the ruling prejudiced him.

B. Other Evidence

Defendant identifies other evidentiary rulings that he argues adversely affected his ability to present a consciousness defense.

1. Dr. Amans

Defendant sought to introduce testimony that Matthew Amans, a physician at San Francisco General Hospital, conducted a CT scan of defendant’s brain in the early morning hours on the day after defendant’s arrest; defense counsel contended this would show that defendant was in such an altered mental state that it was necessary to rule out traumatic brain injury. The CT scan, as it turned out, showed no brain injury. The prosecutor argued the evidence had limited relevance, if any, to whether defendant was conscious when he kicked Tran at 9:20 p.m. the prior day. The trial court agreed that Amans’ testimony that the CT scan showed no traumatic brain injury was not relevant to the issue of defendant’s consciousness at the time of incident and excluded it.

⁸ The question itself is indicative of the range and breadth of defense counsel’s trial examination of Rutter regarding defendant’s “symptoms and diagnoses.”

Defendant assigns error. Even assuming Amans' testimony was relevant, defendant cannot show he was prejudiced by its exclusion. Ghaly himself diagnosed defendant with unspecified psychotic disorder after he was arrested. The jury saw video footage of defendant's behavior before, during, and after the incident, and heard lay witness testimony describing the incident. Ghaly's and Rutter's testimony included descriptions of defendant's erratic behavior. Had Amans testified that the CT scan showed no traumatic brain injury, there is no reasonable probability of a different result for defendant. (*Watson, supra*, 46 Cal.2d at p. 836.) Defendant therefore cannot show prejudice.

2. The 5150 Hold in 2016

Defendant sought to introduce testimony of a doctor (Christopher Wadsworth) or registered nurse (James Gilliam) in the San Francisco General psychiatric emergency ward that defendant had been placed on a 5150 hold on March 6, 2016 (about a year before the incident) because he was suicidal. After the prosecution challenged the relevance of the evidence, the trial court heard argument. Defense counsel agreed with the court's observation that mental illness by itself does not mean someone is unconscious but claimed this was "evidence tending to show or creating the possibility that he was [unconscious]." The trial court excluded the testimony about the 5150 hold as not relevant and cumulative of Ghaly's and Rutter's testimony.

We conclude the trial court did not abuse its discretion in ruling that the proposed testimony was cumulative of Ghaly's and Rutter's testimony that defendant was suffering from an unspecified psychotic disorder at least as far back as 2015. (Evid. Code, § 352.) Nor has defendant shown that the exclusion of this evidence prejudiced him. (*Watson, supra*, 46 Cal.2d at p. 836.) Testimony about a single incident showing defendant was suicidal would not have made it reasonably probable that defendant would receive a more favorable result, especially as the evidence of defendant's mental illness was extensive, the prosecution did not dispute defendant suffered from mental illness, and there is no evidence suggesting that this acute psychiatric incident meant defendant was more likely to have been legally unconscious during the charged incident one year later.

3. Pharmacist Who Medicated Defendant in 2015

Defendant sought to admit the testimony of a pharmacist in jail psychiatric services who worked with Ghaly to administer medication to defendant. The offer of proof was that Ghaly relied on the pharmacist for information regarding compliance with taking medications. The prosecution challenged the relevance of the evidence, and the trial court agreed. We see no error. The proffered evidence would have been cumulative of Ghaly's testimony that defendant was prescribed antipsychotic medication as early as 2015, and Rutter's testimony that defendant responded positively to antipsychotic medication after the MUNI bus assault. In any event, defendant has not persuaded us that any error was prejudicial.

4. Certain Body-Worn Camera Footage

Defendant challenges the exclusion of a few minutes of audio from the body-worn camera footage of one of the officers who responded to the incident, arguing it is probative of defendant's cooperation with the arresting officers and contains defendant's statements consistent with being unconscious. The prosecution objected to the audio because it contained defendant's own "untrustworthy and unreliable," "self-serving" statements, which were different from those he made on the bus minutes earlier and allegedly motivated by a desire to appear "sympathetic."⁹

After an extensive hearing, the trial court ruled the video footage would be excluded because the statements were not relevant and because video from another officer's body-worn camera was already being admitted and that video contained "many of the same statements." The following day, the trial court expanded its ruling to permit defendant to play previously excluded video to the jury without the audio, and reserving

⁹ The portion of the tape at issue is not part of the record on appeal; apparently, neither side used the body-worn camera footage at issue without the audio, or used the audio for impeachment, as the trial court would have permitted. The prosecutor described the audio as containing statements about "four little black girls killing the defendant's mother and other things like that." The prosecution argued that there was already "about ten minutes" of video footage from the time defendant kicked Tran until the police arrived.

that defendant could use the audio if necessary for impeachment purposes. The trial court subsequently reviewed the footage at issue and clarified the particular portion (by minute and second) that defense counsel could show the jury.

Defendant's challenge is without merit. Defendant cannot introduce his own statements into evidence because his statements are hearsay. (Evid. Code, § 1200; *People v. Sundlee* (1977) 70 Cal.App.3d 477, 483 ["The recording could not make their inadmissible statements admissible"].) Even if they were not being admitted for the truth, defendant has not shown that the trial court was incorrect in observing that many of the disputed statements were audible on other admitted body-worn camera footage. In any event, any error was harmless because the jury viewed other video footage with audio from another officer's body camera and defendant cites no specific statements or excluded portions of the video that would have reasonably led to a more favorable result.

5. Question to an Eyewitness

Defendant contends the trial court erred in sustaining an objection to a question asked of a witness, who was a passenger on the MUNI bus and witnessed the assault, as to whether she believed defendant was "imagining things" that she heard him say. "A lay witness generally may not give an opinion about another person's state of mind, but may testify about objective behavior and describe that behavior as being consistent with a state of mind." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 130–131.) But, even assuming error, any error was harmless in the context of the entire examination of this witness. Here, defense counsel was given free rein to ask the witness to describe defendant's behavior and statements, to explain why the witness had repeatedly called defendant a "psychopath" that night, and to describe why "his behavior seemed psychotic." Defense counsel later used the witness's opinion that defendant was psychotic in closing argument. Defendant has not shown prejudice.

6. Hypothetical Question to the Psychiatrist

As we have described, Ghaly was asked a hypothetical question that closely tracked defendant's behavior at the time of the incident. Defendant complains that the trial court erred in sustaining an objection to defense counsel's first attempt at asking this

hypothetical question when defense counsel referred to defendant by name. Any error was harmless because defense counsel reframed the hypothetical question and the witness answered the hypothetical question.¹⁰

¹⁰ Citing *People v. Cortes* (2011) 192 Cal.App.4th 873 (*Cortes*) and *People v. Herrera* (2016) 247 Cal.App.4th 467 (*Herrera*), defendant claims the trial court's evidentiary rulings " 'effectively eviscerated any defense' " of unconsciousness.

But *Cortes* and *Herrera* are distinguishable on their facts, and with records that are nothing like this one. In *Cortes*, the Court of Appeal overturned Cortes' conviction because the only defense expert was precluded from explaining that Cortes suffered from PTSD, that Cortes' PTSD could lead him to be in a dissociative state, and that a person in a dissociative state could act without conscious volition. (*Cortes, supra*, 192 Cal.App.4th at pp. 910–912.) Likewise, in *Herrera*, the Court of Appeal overturned Herrera's conviction because his expert was not allowed to explain how PTSD could have affected his mental state when he committed the offense. (*Herrera, supra*, 247 Cal.App.4th at pp. 475–480.)

Having found no state law evidentiary errors or, to the extent there were, that they were harmless under any standard, we do not reach defendant's argument that his federal constitutional rights to due process and present a defense were violated. "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' " (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103, citing *People v. Mincey* (1992) 2 Cal.4th 408, 440, and *People v. Hall* (1986) 41 Cal.3d 826, 834.) "[I]f the exculpatory value of the excluded evidence is tangential, or cumulative of other evidence admitted at trial, exclusion of the evidence does not deny the accused due process of law." (*People v. Smithey* (1999) 20 Cal.4th 936, 996.)

We note that whether defendant was legally unconscious occupied a substantial portion of the closing arguments. Defense counsel argued robustly that the prosecutor had failed to show defendant was conscious of what he was doing when he struck Tran. Defense counsel argued that defendant indisputably had a psychotic disorder, which symptoms, per Ghaly and Rutter, included delusions, hallucinations, and loss of touch with reality. Ghaly evaluated and prescribed defendant an antipsychotic medication within a week of his arrest. On the day of the attack, victim Tran and an eyewitness described defendant as "psychotic" and a "psychopath." Defendant lacked a motive for the assault and stayed for more than 10 minutes after kicking Tran in the head "[b]ecause he wasn't conscious of what he was doing. It was his mental health symptoms that led this to happen." Defense counsel played video footage from the day of the incident which he asserted showed defendant "displaying clear symptoms of a psychotic episode," and which Dr. Ghaly had testified were "entirely consistent with someone who is unconscious." Defense counsel urged the jury to "[l]ook at [defendant's] behavior. Look

II. Mental Health Diversion Eligibility Hearing

Defendant asserts, in the alternative, that his case must be remanded for the trial court to conduct a mental health diversion eligibility hearing pursuant to a diversion program for mentally ill defendants that was enacted after he was sentenced. (Pen. Code, § 1001.36.)

Penal Code section 1001.36, which went into effect on June 27, 2018, permits discretionary diversion of persons with qualifying mental disorders that contributed to the commission of the charged offense. This legislation has been held to be retroactive to pending cases. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 788–792 (*Frahs*), review granted Dec. 27, 2018, S252220.)¹¹

Here, like *Frahs*, defendant’s “case is not yet final on appeal and the record affirmatively discloses that he appears to meet at least one of the threshold requirements (a diagnosed mental disorder).” (*Frahs, supra*, 27 Cal.App.5th at p. 791.) While the Attorney General acknowledges that, under *Frahs*, section 1001.36 is retroactive, he contends “[t]he record demonstrates a remand would be an idle act in this case.” Specifically, the Attorney General notes that defendant declined a pretrial offer of probation with Behavioral Health Court, and the trial court rejected a grant of probation at sentencing because defendant was too dangerous to others.

We disagree that remand would necessarily be futile. Defendant was not charged with a disqualifying offense and was diagnosed with a qualifying mental disorder during trial. Under the circumstances, it is appropriate to remand this matter for the trial court to consider whether to exercise its discretion to grant diversion under Penal Code section

at what he’s saying. There’s no doubt what we’re dealing with is an acute psychotic episode. Everyone on the bus knew it. You all know it. Dr. Ghaly knew it. Everybody knows.”

¹¹ Our Supreme Court granted review in *Frahs* on the following issues: whether Penal Code section 1001.36 applies retroactively to all cases where the judgment is not yet final, and whether the court of appeal erred by remanding for determination of defendant’s eligibility under that section. (*People v. Frahs* (2018) 242 Cal.Rptr.3d 417.)

1001.36. In remanding the matter, we express no opinion as to how the trial court should exercise its discretion.

DISPOSITION

Judgment is conditionally reversed. The cause is remanded to the trial court with directions to conduct a diversion eligibility hearing under Penal Code section 1001.36 no later than 90 days from the filing of the remittitur. If the trial court determines that defendant qualifies for diversion under Penal Code section 1001.36 then the court may grant diversion. If defendant successfully completes diversion, then the court shall dismiss the charges. However, if the trial court determines that defendant is ineligible for diversion or defendant does not successfully complete diversion, then his convictions and sentence shall be reinstated.

Miller, J.

We concur:

Richman, Acting P.J.

Stewart, J.

A153536, *People v. Murrillo*